IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 11, 2007 Session

ELAINE S. BILDNER AND JOHN H. BILDNER, JR.
V. GAYLORD ENTERTAINMENT COMPANY

Appeal from the Circuit Court for Davidson County
No 04C2819 Walter C. Kurtz, Judge

M2006-00840-COA-R3-CV - Filed on April 9, 2007

Elaine S. Bildner and her husband, John Bildner, Jr., have appealed the decision of the trial court in granting Gaylord Entertainment Company's Motion for Summary Judgment thereby dismissing their negligence action. We are called upon to review the propriety of the action of the trial court in this determination. After reviewing the record, we hold that the Bildners failed to establish that Gaylord Entertainment Company breached any duty of care. Specifically, the Bildners failed to offer any proof tending to show that the porch composed of aggregate concrete surface where Ms. Bildner fell constituted a defective and/or dangerous condition. Accordingly, we affirm the trial court's granting of summary judgment to Gaylord Entertainment Company.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed

J. S. (STEVE) DANIEL, Sr. J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, Jr.,JJ., joined.

Fletcher W. Long, Murfreesboro, Tennessee and Charles E. Sizemore, Nashville, Tennessee, for appellants, Elaine S. Bildner and John H. Bildner, Jr.

Rose P. Cantrell and Joel P. Surber, Nashville, Tennessee, for Appellee, Gaylord Entertainment Company.

OPINION

Factual and Procedural History

On December 13, 2003, the Bildners were on Gaylord Entertainment Company's (Gaylord) property for the purpose of attending a performance of the Rockettes at 8:00 p.m. at the "Grand Ole Opry." Prior to the performance, the Bildners had dinner at a restaurant located within walking distance of the auditorium and were walking to the performance location about 7:00 P.M. when it

began to rain. Earlier in the evening it had been raining and the Bildners had left their umbrella in their automobile. As a result of the rain they sought shelter on a covered porch of the Opry Plaza. As Ms. Bildner stepped onto the Opry Plaza porch, she slipped and fell, sustaining injuries. The area in which the fall occurred was on an aggregate concrete porch. A review of the record establishes that an aggregate concrete surface is a concrete surface in which the binding concrete paste has been partially removed exposing the gravel stone aggregate. On September 8, 2004, the Bildners initiated a lawsuit against Gaylord in which they asserted that Ms. Bildner's fall was caused by Gaylord's negligence in the creation of a dangerous condition, i.e., a slick aggregate surface. Gaylord filed an answer on November 5, 2004, in which they denied any negligence or proximate causation of any injuries claimed by the Bildners. After these initial pleadings, the parties engaged in discovery which was used to support or resist the motion for summary judgment filed by Gaylord. The key allegation which the Bildners advanced was that the aggregate concrete had been pressure washed to such an extent that the stones in the concrete surface where exposed and were so smooth that the surface was slick and dangerous when dry and exceptionally slick when wet and therefore, unreasonably dangerous. Gaylord employed an architect, Mr. N. Mitchell Barnett, to inspect the Opry Plaza where the fall occurred, to review the incident report from the fall, the depositions of the plaintiff, the written discovery, the pleadings and to make a report on his findings. This report was presented to the trial court in the form of Mr. Barnett's affidavit. The salient points of Mr. Barnett's affidavit were,

> The surface area upon which Ms. Bildner claims to have fallen is an exposed aggregate surface. This means, simply stated, that aggregate stones within the concrete have been exposed by process to extrude from a cement paste which binds the mixture to form the "slab." The cement paste remains and surrounds the exposed aggregate.
>
> The exposed aggregate surface in question is located under an extended porch extruding from a building and is properly installed and maintained in all respects.
>
> It is my opinion to a reasonable degree of professional certainty that use of an exposed aggregate surface in an area such as the area of the Opry Plaza in question is completely reasonable and in conformity with local industry/commercial standards and practices in the Nashville, Davidson County, Tennessee area.
>
> Further, it is my opinion to a reasonable degree of professional certainty that the specific exposed aggregate surface area in question in this case was free from defect. The slip resistance of the exposed aggregate area in question met or exceeded that necessary for a commercial area in or about the Nashville, Davidson County, Tennessee area.

> The use of the exposed aggregate surface in question, in its original state, would have been completely reasonable and appropriate. I observed, however, that the area in question has been traversed often during the years in which it has been in place. This wear on the surface has actually **enhanced** its slip resistance because more of the abrasive texture of the cement paste has been exposed.
>
> Finally, it is my opinion to a reasonable degree of professional certainty that the exposed aggregate surface in question presented no more risk to a reasonable person exercising ordinary care than would any other commercially acceptable alternative that Gaylord could have employed in the construction of the area.

The Bildners employed Mr. Sammy Harrington in an effort to refute the expert opinion as to the condition of the Gaylord porch. Mr. Harrington had been employed with Dan's Asphalt and Concrete in Nashville, Tennessee since 1973, and was experienced in paving of commercial parking lots, residential driveways and entryways. He made an examination of the general area where the fall occurred on September 10, 2005, twenty-one months after the fall. Mr. Harrington's deposition, affidavit, and interrogatory responses were considered by the trial court in deciding the motion for summary judgment.[1]

Mr. Harrington's affidavit was presented to refute the expert affidavit of Mr. Barnett. The salient parts of Mr. Harrington's affidavit were as follows:

> In my professional opinion, the surface had been subjected to numerous pressure washings, resulting in the condition of the surface being deteriorated and uneven, with the concrete grain having been washed away and the larger, smooth red and brown stones becoming more prominent.
>
> While some of the area of the surface around where Plaintiff Elaine Bildner fell has sufficient slip resistance, the areas, of which there were several, containing those areas made up of the larger, smooth red and brown stones present an unacceptably dangerous condition even when dry and an even more dangerous and hazardous condition when wet.

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[1] The record reflects that Gaylord filed a motion to strike the testimony of Mr. Samuel D. Harrington contending that he did not have the requisite qualifications to render an expert opinion in the matter and that he failed to support his offered opinions with any reasoning of scientific support. It was the contention of Gaylord that Mr. Harrington failed to have the qualifications as an expert to present an expert opinion in accordance with McDaniel v. CSX Transportation, Inc. 955 S.W.2d 257 (Tenn. 1997). However, the trial court never ruled on the motion and supplemented the trial record with Mr. Harrington's deposition.

> Therefore, this area, in order to be made safe, should have long since been re-paved or the smooth, larger stones removed.
>
> It is therefore my opinion that the surface, while probably acceptable at the time it was poured, became unreasonably dangerous over the passage of time and the resulting dangers and hazards thereby presented to an unsuspecting public should have been addressed and remedied by owners of the premises.

Interrogatories were propounded to Ms. Bildner in which she admitted that the aggregate porch where she fell was a common type porch for commercial and residential building and was in conformity with local industry standards and practices in Nashville, Davidson County, Tennessee. She also admitted in her interrogatory response that the slip resistance of the exposed aggregate area in question met or exceeded that necessary for a commercial area in or about Nashville, Davidson County, Tennessee.[2]

Mr. Harrington's deposition established that he had no knowledge of slip resistance or how to measure it. Mr. Harrington has a 11th grade education and has not completed a GED. His experience has been in the pouring of concrete and the laying of asphalt. His examination of the fall area consisted of being told by Ms. Bildner's attorney the area of the fall and his "eyeballing" the area. He also got down on the concrete and rubbed the area with his hand. Mr. Harrington did not read the deposition of Ms. Bildner or the incident report and he admitted that he has relied on what others have told him to be the place of the fall.

The trial court, after reviewing the various pleadings, granted the Motion for Summary Judgment finding that the plaintiff had failed to establish the breach of a duty by Gaylord.[3]

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[2]

The exposed aggregate porch upon which Ms. Bildner fell was/is in fact a common feature/substance to numerous commercial and residential buildings and was in conformity with local industry/commercial standards and practices in the Nashville, Davidson County, Tennessee area.

RESPONSE:

Admitted for purposes of this summary judgment motion only.

The slip resistance of the exposed aggregate area in question met or exceeded that necessary for a commercial area in or about Nashville, Davidson County, Tennessee area.

RESPONSE:

Admitted for purposes of this summary judgment motion only.

[3]

In reaching its decision, the Court finds that Plaintiffs have not established the requisite element of duty necessary to establish a prima facie case of negligence against Gaylord. Specifically, the Court finds that Plaintiffs have produced no evidence that Gaylord had notice, actual or constructive, of a dangerous condition in the area in question and/or that Plaintiff Elaine Bildner's injury was a reasonably foreseeable probability. The Court further finds no evidence that Gaylord should have been aware of any such condition.

DISCUSSION

I. Standard of Review

The standard utilized by this Court when reviewing a trial court's granting of summary judgment is as follows:

> The standards governing an appellate court's review of a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the lower court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tennessee Rule of Civil Procedure 56 have been met. See Staples v. CBL & Assoc., Inc., 15 S.W.3d 83, 88 (Tenn. 2000); Hunter v. Brown, 955 S.W.2d 49, 50-51 (Tenn. 1997); Cowden v. Sovran Bank/Central South, 816 S.W.2d 741, 744 (Tenn. 1991). Tennessee Rule of Civil Procedure 56.04 provides that summary judgment is appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. Staples, 15 S.W.3d at 88.

Blair v. West Town Mall, 130 S.W.3d 761, 762-64 (Tenn. 2004)

II. Duty of Care of Premises Owner

A negligence claim such as that of the one for premises liability requires proof of the following elements: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct by the defendant falling below the standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate or legal cause. Coln v. City of Savannah, 966 S.W.3d 34, 39 (Tenn. 1998), (citing Bradshaw v. Daniel, 854 S.W.2d 865, 869 (Tenn. 1993)). As is evident, the initial requirement is that the plaintiff establish the existence of the legal duty. The question of whether a legal duty exists is a question of law for the court which requires the consideration of whether such a relationship exists between the parties that the community would impose a legal obligation upon one for the benefit of others - or, more simply, whether the interest of the plaintiff which has suffered invasion was entitled to legal protection at the hands of the defendant. Id. at 870 (quoting W. Page Keeton, Prosser & Keeton on the Law of Torts, § 37 at 236 (5th ed. 1984)). Coln, 966 S.W.2d at 39.

Coln, id. at 43, provides the standard for the premises owner's duty of care when the court adopted the language of Doe v. Linder Const. Co. Inc., 845 S.W.2d 173, 178 (Tenn. 1992) which stated:

> The question of whether the [defendants'] general duty of care encompasses the duty to guard against the acts set forth in the complaint involves an analysis of the foreseeability of the risk to which [the plaintiff] was exposed. In other words, the issue is whether [the plaintiff] has made 'any showing from which it can be said that the defendants reasonably knew or should have known of the probability of an occurrence such as the one which caused [her] injuries.'

In premises liability cases, the superior knowledge of the condition of the premises possessed by the owner or operator is the basis of liability. Eaton v. McLain, 891 S.W.2d 587, 593-94 (Tenn. 1994); Ogle v. Winn-Dixie Greenville, Inc., 919 S.W.2d 45, 46 (Tenn. Ct. App. 1995). Before the owner or operator of a premises may be held liable for negligently allowing a dangerous or defective condition to exist on the premises, the plaintiff must prove the following:

> (1) the condition was caused or created by the owner, operator, or his agent, or (2) if the condition was created by someone other than the owner, operator, or his agent, that the owner or operator had actual or constructive notice that the condition existed prior to the accident.

Blair v. West Town Mall, 130 S.W.3d 761, 764 (Tenn. 2004); Jones v. Zayre, Inc., 600 S.W.2d 730, 732 (Tenn. Ct. Ap. 1980)

In this case Ms. Bildner is contending that the dangerous or defective condition was caused or created by Gaylord. However, as was stated in Rice v. Sabir, 979 S.W.2d 305, 309 (Tenn. 1998), "the duty imposed on the premises owner or occupier, however, does not include the responsibility to remove or warn against 'conditions from which no unreasonable risk was to be anticipated, or from those which the occupier neither knew about nor could have discovered with reasonable care.'" The admissions of Ms. Bildner that the porch surface conformed with local building standards and that the slip resistance of the surface met or exceeded that necessary for commercial surfaces would lead to the conclusion that "no unreasonable risk was to be anticipated" from the porch surface.

CONCLUSION

The party moving for summary judgment may prevail by "affirmatively negating an essential element of the non-moving party's claim, i.e., a defendant in a negligence action would be entitled to summary judgment if he convinced the court that he owned no duty to the plaintiff." Byrd v. Hall, 847 S.W.2d 208, 216 (Tenn. 1993). Tennessee case law makes clear what burden is placed on each party in a motion for summary judgment. Staples v. CBL & Assoc., Inc., 15 S.W. 3d 83 (Tenn. 2000) addressed the burden-shifting framework to be applied in the Motion for Summary Judgment analysis. When the party seeking summary judgment makes a properly supported motion, the burden shifts to the non-moving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact. To property support its motion, the

moving party must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. If the moving party fails to negate a claimed basis for the suit, the non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail. If the moving party successfully negates a claimed basis for the action, the non-moving party may not simply rest upon the pleadings, but must offer proof to establish the existence of the essential elements of the claim. Staples, 15 S.W.3d at 88-89. The determination of whether a duty is owned requires a balancing of the foreseeability and gravity of the potential harm against the burden imposed in preventing that harm. McClung v. Delta Square Ltd. Partnership, 937 S.W.2d 891, 901 (Tenn. 1996). Assuming a duty of care is owed, be it a duty to refrain from creating a danger or a duty to warn against an existing danger, it must then be determined whether a defendant has conformed to the applicable standard of care, which is generally reasonable care under the circumstances. "Ordinary, or reasonable, care is to be estimated by the risk entailed with the risk of injury." Doe v. Linder Const. Co., Inc., 845 S.W.2d 173, 178 (Tenn. 1992). As has been pointed out, the existence or nonexistence of a duty owed to the plaintiff by the defendant is entirely a question of law for the court. Coln, 966 S.W.2d at 39.

Here, Gaylord by the affidavit of Mr. Barnett and the interrogatory responses of Ms. Bildner, negated an essential element of the claim, i.e., the duty of care. Therefore, the burden shifted to Ms. Bildner to produce evidence establishing the existence of a genuine issue for trial. She attempted to accomplish this with the affidavit of Mr. Harrington.

Although Mr. Harrington's affidavit attempts to make a jury issue from the dangerous propensity of the aggregate concrete porch, our review of his deposition reveals that he cannot refute Gaylord's expert that the porch surface met the appropriate building standards and industrial standards for slip resistence. Therefore, he is unable to refute expert testimony by affidavit of Mr. N. Michael Barnett to the effect that the porch in question was not dangerous and met all commercial standards required.

We conclude from the record that the trial court was not in error in finding that Ms. Bildner failed to come forward and meet her burden to produce evidence establishing a genuine issue for trial, i.e., a defective and dangerous condition. Accordingly, we affirm the trial court's granting of Gaylord's Motion for Summary Judgment as "an owner or an occupier to be found negligent, there must be some evidence that there was a dangerous or defective condition on the premises." The trier of fact "cannot conclude that an owner or ocupier failed to exercise reasonable care to prevent injury to persons or their property if there is no evidence of a dangerous or defective condition. If no dangerous or defective condition exists, the owner or occupier cannot be held liable for failing to take action in order to remedy the supposed condition." Nee v. Big Creek Partner, 106 S.W.3d 650, 653-54 (Tenn. Ct. App. 2002).

After a complete review of the record, we find that Ms. Bildner failed to prove a necessary element of her negligence action, the existence of a duty on the part of Gaylord. For the reasons set forth herein above, we affirm the trial court's granting of the summary judgment to Gaylord Entertainment Company. Costs of this appeal are to be taxed against the appellant, Ms. Elaine S.

Bildner, and her sureties for which execution may issue, if necessary.

J. S. DANIEL, SENIOR JUDGE